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Planning Law in Wales: Part 2 Lessons in Law-Making for Wales

The Planning (Wales) Act 2015: Lessons in Law Making under Devolution

Introduction

In their earlier article the authors set out the key provisions of the Planning (Wales) Act 2015 and how this related to both the evidence base and other related reforms of the law in Wales. In this article, we consider the passage of the Act as a case study in policy development and law making under Welsh devolution and the prospects for further reform and restatement.

The Planning Reform Agenda

As outlined in our previous work, the emergence of distinct planning systems in Wales and England has roots dating back to administrative devolution under the Welsh Office. However, radical reform had to await the prospect of primary legislative powers over the planning system as a whole. This was achieved (subject to some important exclusions) following the Welsh primary powers referendum of 2011 and the election of the Fourth National Assembly for Wales in 2011. However, some foundation work had already been done during the Third National Assembly 2007-2011.

The Third National Assembly 2007 – 2011

The Environment and Sustainability Committee of the National Assembly undertook an Inquiry into the Planning System in Wales during 2010/11: *National Assembly for Wales: Sustainability Committee: Inquiry into Planning in Wales: January 2011*¹. The Committee received evidence of the pressures faced by local planning officers in delivering on the ever increasing demands put on them. These demands include the requirement for ever greater levels of technical expertise over a broadening range of topics.

In 2012, the Committee also published a report *Energy Policy and Planning in Wales: National Assembly for Wales: Environment and Sustainability Committee: Energy Policy and Planning in Wales: June 2012*², which considered the obstacles to effective energy planning in Wales.

The Welsh General Election 2011

Notwithstanding the groundwork done by the Committee, none of the main political parties' manifestos in the Welsh General Election of 2011 contained proposals for a comprehensive programme of reform of planning. There was certainly nothing comparable to the "Open Source Planning" proposals in the 2010 Conservative Party UK General Election Manifesto, which informed the Localism Act 2011 and concept

¹http://www.assembly.wales/en/bus-home/bus-third-assembly/3-committees/3-scrutiny/3-sc/inquiries_sd/sc3_inq_planning/Pages/sc3_inq_planning.aspx.

²<http://www.senedd.assembly.wales/mglssueHistoryHome.aspx?lId=1336>.

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of neighbourhood planning, as well as the vision for the slimmed-down National Planning Policy Framework in England.

It is instructive in this context to record the generally disparate features of the respective party manifesto proposals:

Welsh Conservatives Manifesto: A New Voice For Wales³

The Welsh Conservatives had two primary focuses. First, on making planning more responsive to local need, by reference to protecting flood plains; out-lawing “garden grabbing”; providing guidance on responding to sustainable development and the needs of local communities; ensuring the accountability of National Park Authorities to local communities; and increasing the role of Town and Community Councils in the planning process. Secondly, they considered the role of the planning process in boosting business including the need for more enterprise focused land use planning for farmers and the release of land in rural areas for affordable housing.

Welsh Liberal Democrat Manifesto: “Wales CAN do better”⁴

The Welsh Liberal Democrats were also attentive to the local perspective in planning. They referred to the need to increase ‘local voices in the process, including the right to halt and speed up removals of properties without planning permissions’; address the problems of retrospective planning permission; and create new powers to require an impact assessment of larger super market developments. Further disparate proposals included the reform of LDPs to ensure a less bureaucratic process, with a special focus on urban communities; measures to address “garden grabbing”; and a requirement to introduce planning permission for houses in multiple occupation.

Plaid Cymru/The Party of Wales’ Manifesto: “Ambition is Critical: A Manifesto for a Better Wales”⁵

Plaid Cymru’s manifesto contemplated wholesale reform and aimed to increase the integration of environmental regulation, financial incentives and planning policy by encouraging the development of a low carbon economy and new business growth; responding to local needs; and creating sustainable and modern communities. They also specifically promised to establish a Planning Inspectorate for Wales answerable to the National Assembly. In addition, Finally, with an emphasis on local decision making, Plaid Cymru promised to “immediately instigate a change to planning policy to presume in favour of micro, small-scale or community-owned renewable energy projects, in every area of Wales and to simplify consents and planning approval for renewable energy production”. Finally they included a number of proposals related to the planning and management of Wales’s National Parks. These involved the y

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³ Welsh Conservative Manifesto: A New Voice for Wales (Welsh Conservatives, 2011) available at http://www.euroelection.co.uk/static/manifesto/con_2011/wales.pdf.

⁴ Welsh Liberal Democrat Manifesto: “Wales CAN do better” (Welsh Liberal Democrats, 2011) available at http://d3n8a8pro7vnm.cloudfront.net/ldwales/legacy_url/316/wales-can-do-better-manifesto-2011.pdf?1421774232.

⁵ Plaid Cymru Manifesto: “Ambition is Critical: A Manifesto for a Better Wales” (Plaid Cymru, 2011). Available at http://www.english.plaidcymru.org/uploads/Manifesto_2011/Main_manifesto_English_SP.pdf.

~~proposed to~~ introduction of ~~e-~~an Independent Commission to advise on a policy for National Parks, Areas of Outstanding Natural Beauty (AONB) and Nature Reserves; and ~~a review of the to consider whether~~ planning responsibilities ~~should remain with~~ of National Parks Authorities, ~~the boundaries of National Parks and the possibility of establishing a whether we should create one~~ national organisation to run all National Parks, AONBs and Reserves and ~~whether there should be any changes to boundaries~~. Finally, with an emphasis on local decision making, ~~Plaid Cymru promised to “immediately instigate a change to planning policy to procure in favour of micro, small scale or community owned renewable energy projects, in every area of Wales and to simplify consents and planning approval for renewable energy production.”~~

Welsh Labour Manifesto: Standing up for Wales⁶

Welsh Labour promised to establish a national infrastructure planning system for waste, energy and water and to work with stakeholders to ensure that Local Development Plans (LDPs), and planning policy at a local level, help address the shortfall in homes. They also promised to legislate to create more sustainable communities through new measures on development plans and building standards. Aside from these specific pledges the manifesto also referred to the need to regenerate town centres and revive seaside towns.

Programme for Government 2011-2016

Welsh Labour emerged from the 2011 general election as the largest party in the National Assembly, with 30 of the 60 seats and formed an administration.⁷ The new government moved rapidly to publish its Programme for Government.⁸ Chapter 11 on Environment and Sustainability contained a commitment to the introduction of a Planning Bill. On 12th July 2012 the First Minister gave a statement to the National Assembly on the Government's Legislative Programme 2011-16 and confirmed that it would include a Planning Bill and in doing so said:

“We cannot underestimate the importance of planning for sustainable economic renewal, and we intend to bring forward a Planning Bill that will consolidate existing planning legislation, making it more transparent and accessible. It will also provide an opportunity to reconsider roles and responsibilities, helping us to ensure that we have a planning system that can help deliver economic renewal. A White Paper

⁶ Welsh Labour Manifesto: Standing up for Wales (Welsh Labour, 2011) Available at <http://www.welshlabour.org.uk/uploads/welsh-labour-manifesto.pdf>.

⁷ See further National Assembly for Wales Elections:2011House of Commons RESEARCH PAPER 11/40 19 May 2011 available at <http://researchbriefings.files.parliament.uk/documents/RP11-40/RP11-40.pdf>.

⁸ Programme for Government (Welsh Government, 2011) available at <http://gov.wales/docs/strategies/110929fullen.pdf>.

setting out our proposals will be published towards the end of 2012, and that will be followed by the introduction of a Planning Bill in 2014.”⁹

As outlined in our previous article, the Legislative Programme for 2011-2016 also included a commitment to other legislation on sustainable development and environmental and heritage conservation.¹⁰

⁹ Statement by the First Minister: The Welsh Government's Legislative Programme 2011-16 available at <http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=153&MID=343>.

¹⁰ ~~These are the~~ Well-being of Future Generations (Wales) Act 2015, ~~received royal assent on 29 April 2015 whilst~~ the Environment (Wales) Bill, ~~Act 2016~~ and ~~the~~ Historic Environment (Wales) Act 2016. ~~Bill are expected to be passed early in 2016. See further Williams H and Jenkins V The Planning (Wales) Act 2015: A Case Study in Evidence-based Planning Reform under Devolution JPL 7 (2016) 637-652.~~

Assembling the Evidence Base

In the absence of detailed policy development beyond manifesto commitments from the political parties noted above, the Welsh Government embarked on the preparation of an evidence base by commissioning a number of reports and studies.¹¹ As outlined in our previous paper, one of the most influential reports was that prepared by an Independent Advisory Group (IAG) appointed by the then Minister for Environment and Sustainability, John Griffiths¹², with a remit to:

- Identify the key policy objectives that the planning system is required to deliver now and in the future;
- Assess existing institutional delivery arrangements, noting areas of good practice and areas in need of improvement; and
- Propose options for the future delivery of the planning system, including plan making and development management services.¹³

Meeting the legislative 'slot' allocated for a Planning Bill in the legislative Programme for 2014-15 meant that the IAG had a little over six months to review the planning system as whole and its historical development

~~- Meet the legislative "slot" allocated for a Planning Bill in the legislative Programme for 2014-15 meant that the IAG had a little over six months to review the planning system as whole and its historical development.~~

The IAG issued a call for evidence in November 2011 inviting views on (a) key Policy Objectives (b) Criteria for effective delivery and (c) Roles and Responsibilities in Planning Delivery. There were a total of 110 responses, which compared well with other similar exercises. The responses were classified by type of respondent as: Business/Consultants 22, Local Planning Authorities (LPAs) 18, Government Agencies and other public sector 10, Professional Bodies 20, Voluntary Sector 12, Members of the Public 14, "Other" 9.

While the consultation was in progress the members of the Group took part in a number of expert seminars and the chair of the group visited Scotland and the Department of Communities and Local Government in England. With the submitted evidence to hand the IAG proceeded with wide ranging one to one discussions with stakeholders and also held a number of round-table sessions, including one which heard the arguments for and against a third party right of appeal. Another session

¹¹ See further [JPL article 4](#). [Ibid.](#)

¹² The members of the IAG were: John Davies MBE (Chair – former Chief Planning Inspector for Wales), Jane Carpenter, CBI (Redrow Homes), Andrew Farrow, Flintshire County Council, Chris Sutton, CBI (Jones Lang LaSalle), Lucy Taylor, Planning Aid Wales (Newport City Council), Mike Webb, RSPB and Huw Williams, Law Society (Geldards LLP).

¹³ *Towards a Welsh Planning Act: Ensuring the Planning System Delivers: Report to the Welsh Government by the Independent Advisory Group* (IAG, 2012). Available at <http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/towardsawelshplanningact/?lang=en>.

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which proved influential was a round table with member of the team responsible for the “Tayplan” regional plan covering Dundee city region.

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Draft Planning (Wales) Bill¹⁴

Having assembled its evidence base and announced its intention to legislate, in December 2013 the Welsh Government published a White Paper along with a draft Planning (Wales) Bill for consultation - *Positive Planning: Proposals to Reform the Planning System In Wales*.¹⁵

The White Paper identified a need for culture change, moving away from regulating development towards encouraging and supporting development. It grouped the Government's proposals into four themes: supporting culture change; active stewardship; improving collaboration; and improving local delivery. It noted the linkage between the draft Planning Bill and the Future Generations Bill, the Environment Bill, and the Historic Environment Bill and also the fact that the White Paper's proposals were as extensive as they could be under the terms of the Government of Wales Act 2006. With respect to the latter the government stated its intention to continue to seek control over large energy generating schemes and the Community Infrastructure Levy (CIL).

The Welsh Government also acknowledged that existing primary legislation relating to planning, and new legislation proposed, relied heavily on secondary legislation for implementation. To ensure that secondary legislative proposals could be introduced quickly it stated that it was committed to pre-Act consultation on implementing secondary legislation. Finally, of note was the intention to submit a proposal to the Law Commission on the need to consider the consolidation and simplification of planning law in the future, as part of a consultation on their 12th programme of law reform. The Law Commission has now decided to take this forward as a project.

There were 294 responses¹⁶ to the White Paper summarised in the Welsh Government's Consultation – summary of responses, published in October 2014.¹⁷ In general, the consultation responses demonstrated significant support for the reforms proposed.¹⁸ Of the 43 questions asked more than 65% of respondents agreed with

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¹⁴ The positive planning consultation paper was issued by the Minister for Housing and Regeneration Carl Sargeant. During the scrutiny of the Bill his title had changed to the Minister for Natural Resources following a Cabinet reshuffle.

¹⁵ *Positive Planning: Proposals to Reform the Planning System in Wales* (Welsh Government, 2013) and Draft Planning (Wales) Bill 2013 available at <http://wales.gov.uk/consultations/planning/draft-planning-wales-bill/?lang=en>. See further V Jenkins, 'The Proposals for the Reform of Land Use Planning in Wales' *Journal of Planning Law* (2014) Issue 10 1055-1204.

¹⁶ Taking into account of a number of identical template responses from environmental non-governmental organisations the total was 405.

¹⁷ Consultation Summary of Responses: *Positive Planning: Proposals to Reform the Planning System in Wales* (Welsh government, 2014) available at <http://gov.wales/docs/desh/consultation/141007-positive-planning-summary-of-responses-en.pdf>.

¹⁸ Ibid. pp3-18

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the proposals posed in the consultation document. However, a number of points of disagreement were expressed:

~~Only one round of amendments to an application for Developments of National Significance (DNS) should be permitted after it has been formally registered;~~

~~Significance (DNS) should be permitted after it has been formally registered;~~

- Fees should be introduced to cover the costs of the Welsh Ministers associated with an appeal;
- ~~Local planning authorities~~LPAs should be merged to create larger units;
- The scope of SDPs should be limited to key issues;
- Where a LPA is poorly performing there should be the option to submit planning applications for major development to Welsh Ministers;
- Where a development proposal accords with an allocation in an adopted development plan a new planning application process should be introduced to ensure that only matters of detail such as design and layout are considered;
- The requirement for mandatory design and access statements should be removed;
- The requirement to advertise planning applications for certain developments in a local newspaper should be removed;
- There should be no local variation within a national scheme of delegation for decision making on applications.

From the detailed responses the following key themes were identified:

- Potential impacts on local democratic accountability
- Clarity of the proposals and costs
- Relationship to other legislation
- Incorporation of aspects of planning policy into legislation.¹⁹

In addition, the Environment and Sustainability Committee of the National Assembly conducted a short pre-legislative scrutiny of the draft Bill and the White Paper, which included taking evidence from stakeholders.²⁰ The call for evidence was however, restricted to the Welsh Government and organisations specifically involved with planning, such as Planning Aid, planning consultants, the Welsh Local Government Association, National Parks Wales, the RTPi, the Law Society and the Planning and Environmental Bar Association.²¹ ~~However, it~~ it also included the Welsh Language

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¹⁹ Ibid pp. 18-21.

²⁰ <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?Id=8906>.

²¹ <http://www.senedd.assembly.wales/mglIssueHistoryChronology.aspx?Id=8906&Opt=2>.

Society – Cymdeithas yr Iath Gymraeg, an issue that proved very significant in the development of the legislation.²²

Most organisations had the opportunity to provide oral as well as written evidence during the five occasions on which the Committee sat.²³ The Committee's scrutiny of the Bill resulted in a letter from the Committee to the Minister giving the Committee's views on the reform package and on the draft Bill. The letter raised a number of issues and themes that were to run through the subsequent consideration of the Bill itself:

- The difficulty of judging the impact of new statutory requirements without more information about what they mean in practice and the extent to which secondary legislation was to be relied upon.
- The need for a thorough Regulatory Impact Assessment in order to be able to judge the resource impact of the proposals.
- A clearer link between the planning reform proposals and other existing and proposed legislation.
- The complexity of existing planning legislation for Wales which would be further exacerbated by the Bill.
- The impact of local government reorganisation and a reduction in the number of local planning authorities LPA's on the Bill's proposals.
- The need to reconsider the IAG's recommendations regarding a statutory purpose for planning on the face of the Bill; the reform of the call-in process,²⁴ compulsory purchase powers for development and regeneration,²⁵ and s.106 Agreements.
- The need for decisions on associated development for development of national significance to be taken by Welsh Ministers rather than Local Planning Authorities LPA's.²⁴

The Legislative Process

The Planning (Wales) Bill was published on 6th October 2014 together with the Explanatory Memorandum and the Presiding Officer's Statement. A suite of consultation papers on future secondary legislation were issued at the same time. Published a little later were ~~T~~the Statement of Policy Intent (further elaborating the scheme of secondary legislative powers;~~;~~) and the "Keeling Schedule" (~~s~~showing the

²² Ibid.

²³ <http://www.senedd.assembly.wales/ielIssueDetails.aspx?IId=8906&Opt=3>

²⁴ <http://www.senedd.assembly.wales/mglIssueHistoryHome.aspx?IId=8906&Opt=0>.

existing primary legislative provisions as proposed to be amended) ~~were published a little later~~.²⁵

As devolved legislation the Bill's proposals had to fall within the scope of the devolved powers and subjects. These were set out in the Explanatory Memorandum as follows:

- Section 107 Government of Wales Act 2006 (GOWA) providing for legislative competence for the National Assembly to pass Acts of the Assembly making laws for Wales.
- Section 108 GOWA which provides for the legislative competence to be restricted to subjects listed in Part 1 of Schedule 7 of the Act and does not fall within any of the exceptions to those powers.²⁶

The subjects that provided the Assembly with competence to make the provisions in the Planning (Wales) Bill were:

- Paragraph 18 of part 1 of Schedule 7: "Town and country planning, ...spatial planning ...urban Development.
- Paragraph 12 (Local Government): "Constitution, structure and areas of local authorities ... powers and duties of local authorities and their members and officers".
- Paragraph 6 (Environment): "Town and Village Greens".
- Paragraph 14 (Public Administration): "Inquiries in respect of matters in relation to which Welsh Ministers exercise functions".²⁷

Following ~~the its~~ introduction ~~of~~ the Bill ~~it~~ passed through the four stage legislative procedure of the National Assembly. The stages are:

Stage 1: The Bill is considered by the Legislative and Constitutional Affairs Committee and the relevant subject committee ~~of the~~ National Assembly for Wales. These committees invite submissions and take evidence. Once the committees

²⁵ <http://www.senedd.assembly.wales/mgIssueHistoryHome.aspx?lId=11271>.

²⁶ Planning (Wales) Bill Explanatory Memorandum available at

[http://www.assembly.wales/laid%20documents/pri-ld9940-em%20-](http://www.assembly.wales/laid%20documents/pri-ld9940-em%20-%20explanatory%20memorandum%20to%20the%20planning%20(wales)%20bill/pri-ld9940-em-e.pdf)

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²⁷ Ibid.

have reported the general principles are considered and voted on by the Assembly. If successful at the general principles debate the Bill will progress to Stage 2.

Stage 2: Detailed consideration of each section of the Bill by a committee. Amendments can be tabled and voted on by the committee.

Stage 3: Detailed consideration of each section of the Bill by the whole Assembly. Amendments can be tabled and voted on by the whole Assembly.

Report Stage: An optional stage to make further changes if required. There was no Report Stage on the Planning (Wales) Bill.

Stage 4: A debate and a vote by the whole Assembly on whether to approve the final text of the Bill.

~~Thus, the legislative process includes only two major opportunities to amend the legislation, of which only one is taken on the floor of the Assembly. It should also be born in mind that is important to bear in mind as well that even where there is opportunity for debate before the~~ National Assembly, this is a unicameral legislature with only 60 members, ~~and that the legislative process includes only two major opportunities to amend the legislation, of which only one is taken on the floor of the Assembly.~~

The Stages of the Planning (Wales) Bill.

Stage 1 Consideration of General Principles

The Stage 1 process is split into two distinct elements. First, the Bill is referred for committee consideration and then the committee's findings and recommendations are put before the full Assembly when the Stage 1 debate takes place at a plenary session of the National Assembly. In common with all Bills in the Assembly, the Planning (Wales) Bill was considered by the Legislative and Constitutional Affairs Committee and the Finance Committee and also referred to the appropriate subject committee which in this case was the Environment and Sustainability Committee.

The Constitutional and Legislative Affairs Committee

In the context of Assembly Bills, such as the Planning (Wales) Bill, the remit of this committee is to consider and report on the appropriateness of provisions in the Bill that grant powers to make subordinate legislation to the Welsh Ministers. This Committee was critical of the "Framework" nature of the Bill and its dependence on extensive secondary legislation.²⁸ In particular, the Committee recommended that:

- More detail should be placed on the face of the Bill, particularly in relation to significant policy matters.²⁹
- The Bill should include categories of development to be classified as nationally significant and a list of matters which could be categorised

²⁸ National Assembly for Wales Constitutional and Legislative Affairs Committee Report on the Planning (Wales) Bill (National Assembly for Wales, 2015).

²⁹ Ibid Conclusion 2.

as secondary consents; which could be amended by subordinate legislation subject to the affirmative procedure.³⁰

~~It is notable that the first of these recommendations was pursued by the Environment and Sustainability Committee of the National Assembly for Wales, but not the second. Subsequently, the final Bill did not include specific reference to either categories of nationally significant infrastructure or secondary consents. and that neither was eventually included on the face of the Bill. More fundamentally, as~~ The first of these recommendations was pursued by the Environment and Sustainability Committee of the National Assembly for Wales, but not the second.³¹ As a general response to the criticism of the framework nature of the Bill a number of consultations on secondary legislation were issued; some with the Bill and others shortly after its passage through the Assembly.³¹

The Environment and Sustainability Committee

The Environment and Sustainability Committee has nine members and it is again worth emphasising that as the National Assembly is a unicameral legislature, this is the only Committee that sat to consider the Bill in detail.³² The Committee conducted an extensive examination of the Bill and invited submissions from interested parties. The consultation ran from 10th October 2014 to 7th November 2014 and 58 submissions were received mainly from interested organisations. The Committee then held fourteen evidence gathering sessions and heard from a total of 47 witnesses. Therefore, unlike the pre-legislative scrutiny process a much broader range of evidence was received by the Committee. ~~Notwithstanding the larger number of stakeholders involved, once again, but in line with the previous scrutiny~~

³⁰ Ibid. Recommendations 3 and 4.

³¹ See n. 54-62 below.

³² The members of the Environment and Sustainability Committee are Alun Ffred Jones AM, Member for Caernarfon, Plaid Cymru (Chair), Mick Antoniw AM, Member for Pontypridd, Welsh Labour, Jeff Cuthbert AM, Member for Caerphilly, Welsh Labour, Russell George AM, Member for Montgomeryshire, Welsh Conservative Party, Llyr Gruffydd AM, Member for North Wales, Plaid Cymru, Janet Haworth AM, Member for North Wales, Welsh Conservative Party, Julie Morgan AM, Member for Cardiff North, Welsh Labour, William Powell AM, Member for Mid and West Wales, Welsh Liberal Democrats, Jenny Rathbone AM, Member for Cardiff Central, Welsh Labour, Joyce Watson AM, Member for Mid and West Wales, Welsh Labour.

~~procedure~~ most of the organisations that provided written evidence were also questioned orally.

The Committee reported in January 2015 and, while broadly supportive of the Bill, the report made 42 recommendations.³³ Many of the issues raised were the subject of later amendment in the legislative process as follows;

- the need for a statutory purpose for planning in terms of sustainable development;³⁴
- the need to give powers to the Welsh Ministers to decide secondary consents;³⁵
- the need to provide greater co-ordination with the Bills on the Environment and the Well-being of Future Generations and transport strategies for Wales;³⁶
- the need to reconsider the terms of the powers in relation to Town and Village Greens and the work of planning committees;³⁷
- issues related to Joint Planning Boards;³⁸
- the need to consider how the Welsh Language should be supported through the planning process;
- the need for design and access statements;³⁹
- issues of democratic accountability in relation to consultation on the NDF and the definition of DNS on the face of the Bill;⁴⁰
- the voting powers of non-elected members of SDPs and the status of 'place plans'.⁴¹

Thus, this wider form of scrutiny of the Bill resulted in further fundamental issues being raised. However, several of the issues raised in the Committee's previous letter of the Minister were not pursued such as, the impact of local government

³³ National Assembly for Wales Environment and Sustainability Committee Planning (Wales) Bill Stage 1 Committee Report (National Assembly for Wales, 2015).

³⁴ Ibid, Recommendation 4.

³⁵ Ibid, Recommendations 27-29.

³⁶ Ibid, Recommendations 10, 13 and 12 respectively.

³⁷ Ibid, Recommendations 41-42 and 31-35 respectively.

³⁸ Ibid, Recommendation 15.

³⁹ Ibid, Recommendations 6-9.

⁴⁰ Ibid, Recommendation 25.

⁴¹ Ibid, Recommendations 17-20, 25, 21 and 2 respectively.

reorganisation, the reform of the call-in process, compulsory purchase agreements and s106 agreements.⁴²

The Debate on the General Principles of the Bill⁴³

A debate on a motion to agree the general principles of the Bill took place in the Plenary Session of the National Assembly on 11th February 2015 and the motion passed. This was a one hour debate and the main speeches were made by the Minister, the Chair of the Environment and Sustainability Committee⁴⁴ and the lead spokesmen on the bill from the other parties⁴⁵. The financial resolution agreeing to any increased expenditure resulting from the Bill and required under the national Assembly's Standing orders was agreed to at the same time.

The Government responded to the recommendations of the Environment and Sustainability Committee and those of the Constitutional and Legislative Affairs Committee, in a Ministerial Letter to the Chair on the 26th February 2015.⁴⁶ In relation to the criticism of the Constitutional and Legislative Affairs Committee the Minister pointed to extensive information relating to secondary legislation that had been made available at the same time as the Bill was introduced. The letter also pointed to the Statement of Legislative Intent setting out the scheme of secondary legislation and the consultations published alongside the Bill.

Stage 2 Detailed Consideration by Committee

Stage 2 consideration began on the 11th February 2015. This is one of the two stages when amendments are proposed, debated and voted upon. Stage 2 is a Committee stage and takes place in the Committee which considered the principle of the Bill, in this case the Environment and Sustainability Committee. Consideration in

⁴² It is relevant to note here:

1. Local government reform in Wales was under consideration at the time culminating in proposals by the Public Services Minister in June 2016 to reduce the number of local authorities from 22 to either 8 or 9, ~~although the implementation of these proposals await the outcome of the 2016 Welsh general election. Will now depend on the ability of the recently elected minority Labour Government to gain agreement in the Assembly.~~
2. The ability to legislate about compulsory purchase was a "silent subject" in that it was not an expressly devolved subject but could be regarded as incidental or ancillary to a devolved subject such as planning. At this time the ability to legislate on "silent subjects" was the subject of a reference to the Supreme Court: see Agriculture Sector (Wales) Bill Reference by the Attorney General for England and Wales [2014] UKSC 43.
3. The incorporation of the tests for a valid planning obligation into the CIL regulations was considered to have taken s.106 outside the scope of the devolved subject of town and country planning due to the CIL being considered a financial levy and akin to taxation at that time a completely non devolved topic; although now see the Wales Act 2014 for the devolution of certain indirect taxes.

⁴³ [http://www.assembly.wales/en/bus-](http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=3107&assembly=4&c=Record%20of%20Proceedings#200105)

[home/pages/rop.aspx?meetingid=3107&assembly=4&c=Record%20of%20Proceedings#200105](http://www.assembly.wales/en/bus-home/pages/rop.aspx?meetingid=3107&assembly=4&c=Record%20of%20Proceedings#200105)
⁴⁴ Alun Ffred Jones AM (Plaid Cymru, Carnarfon).

⁴⁵ Llyr Gruffydd (Plaid Cymru – North Wales), Russell George (Welsh Conservative, Montgomeryshire), William Powell (Welsh Liberal Democrats).

⁴⁶

<http://www.senedd.assembly.wales/documents/s37375/Correspondence%20from%20the%20Minister%20for%20Natural%20Resources%20-%2026%20February%202015.pdf>

Committee began on the 18th March 2015 and continued on the 26th March. In total the Stage 2 Committee consideration took around four and a half hours.

In the days leading up to the start of Stage 2 Consideration nearly 200 amendments were tabled. For the purposes of the debate the Bill was considered by the Committee in the following order; main body of the bill (sections 2 – 55), schedules to the Bill, Section 1 – overview and the Long Title. The amendments were marshalled and grouped accordingly.⁴⁷ Each group of amendments was debated separately and then each of the amendments voted upon individually. Due to the finely balanced political composition of the National Assembly many of the opposition amendments were defeated on the casting vote of the Chair of the Committee, who can only vote in the event of a tie and who is required by the Standing Orders⁴⁸ to vote against an amendment.

The list of grouped amendments indicates the topics that were of concern to the members of the Committee. The most significant topics were:⁴⁹

- Planning Inspectorate for Wales. The IAG had recommended retention of a combined England and Wales Inspectorate and an amendment seeking to create a separate inspectorate was defeated.
- Statutory Purpose of Planning. An amendment in the terms suggested by the IAG was defeated but only after the Minister indicated that consideration was being given to a Government Amendment that would take account of the Well-Being of Future Generations (Wales) Bill, then in its later stages.
- National Development Framework. Amendments to the arrangements for public consultation and Assembly consideration; and specifying an end date for the NDF.
- The Welsh Language. The amendments proposed revealed a division between the views of the Government and the opposition parties. During the Stage 1 committee the Leaders of eight local authorities⁵⁰ had urged support for making the effect on the Welsh language an identified material consideration in determining planning applications and capable of justifying refusal. This argument gained some traction with the committee, which recommended a “clarification” provision that impact on the Welsh language could be a material consideration in determining planning applications. However, the Government’s approach was to strengthen the consideration and appraisals of the impact on the Welsh language of LDP policies during the plan making process and at this stage the Government remained opposed

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⁴⁷ Marshalled amendments available at <http://www.senedd.assembly.wales/documents/s37788/Groupings%20of%20amendments%2018%20March%202015.pdf>.

⁴⁸ See SO 6.20 of the Standing Order of the Fourth National Assembly.

⁴⁹ The other headings were: Direct applications to the Welsh Ministers. The amendments here were mainly directed at debating the circumstances in which a local authority would be found to be under-performing; Local Development Plans; Health Impact Assessments; Pre- application Procedure; Drafting and technical amendments; Consequential Amendments on the Town and Country Planning (Determination of Procedure) (Wales) Order 2014

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⁵⁰ Bridgend, Pembrokeshire, Wrexham, Carmarthenshire, Conwy, Ynys Môn, Ceredigion and Gwynedd.

to any special status for Welsh as a material consideration in determining individual applications.

- Strategic Planning. The proposals for Strategic Development Plans were seen by some members as adding unnecessary complication to the development plan hierarchy. Arguments were advanced that the problems that the SDP's were intended to resolve could be addressed by a statutory duty on LPA's to co-operate and strengthened duties on statutory consultees to contribute to the efficient operation of the planning system. There was also opposition to the inclusion of up to one one-third nominated members on the proposed Strategic Planning Panels. The Government view remained that a duty to co-operate was too weak and that partial SDP coverage that did not create duplication and overlap with the LDP's was a better solution. The Government did, however, agree to make the nominated members of the SDP Panels non-voting.
- Community Involvement. The amendments here were focussed on two issues. Firstly there was a series of amendments to introduce a third party right of appeal. The Government maintained its support for the conclusions of the IAG that third party rights of appeal were not a solution to perceived weaknesses of the planning system and the amendments were not approved. Secondly, there was an attempt to move in the direction of the "localism" agenda by giving statutory status to Community Council "place plans". These amendments were also lost and the Government expressed its support for the IAG view that recommended supporting community councils who wish to produce place plans and giving them status via Supplementary Planning Guidance.

Local Development Plans

Health Impact Assessments

Pre-application Procedure

- Development of National Significance. There was discussion about the relatively restricted categories of development subject to this procedure and arguments that they should appear on the face of the Bill. There was also discussion about whether this would be the procedure applied to larger energy schemes in Wales if responsibility for them was devolved as recommended by the Silk Commission. The Minister had confirmed in a letter to the Stage 1 Committee that if such schemes were devolved then the Welsh DNS system was designed to deal with them and that they would be subject to that procedure rather than an application of the Planning Act 2008 to Wales. The Government agreed to an amendment providing a statutory determination period of 36 weeks of acceptance of the application. Further amendments were unsuccessfully advanced seeking to introduce a compensation regime for depreciation of property values due to developments of national significance.
- Town and Village Greens. The Bill as introduced adopted the changes already in force in England which broadly restrict the right to apply for the registration

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of a town or village green to one year after access is terminated and once a site has entered the planning system. Notwithstanding the wide support for these reforms during the White paper consultation the Open Spaces Society successfully lobbied Government AM's to oppose the reforms. with t
The result is that the time limit for claiming a TVG remains at two years and protection from an application is only obtained once a site has the benefit of planning permission.

- Strategic Planning Panels. These were mainly opposition amendments relating to the constitution of the panels and their status. They also explored the issue of a gender equality provision, which the Government undertook to consider.

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—Local Development Plans

—Health Impact Assessments

—Pre- application Procedure

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—Drafting and technical amendments

—Direct applications to the Welsh Ministers. The amendments here were mainly directed at debating the circumstances in which a local authority would be found to be under-performing.

- Consequential Amendments on the Town and Country Planning (Determination of Procedure) (Wales) Order 2014.

—There were also a number of less controversial Government amendments including: retaining DAS (although the intention is that they will now be restricted to major or sensitive applications only; Invalid applications: notice and appeal, extending the new arrangements for validation appeals to additional validation requirements; allowing Joint Planning Boards to be constituted which include the area of a national park authority. On appeals, the Government also supported

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amendments regulating amendments and re-consultation once an appeal has commenced.

- ~~— Design and Access Statements. These were Government amendments retaining DAS. However, the intention is that DAS will now be restricted to major or sensitive applications only.~~
- ~~- Invalid applications: notice and appeal. These were Government amendments, extending the new arrangements for validation appeals to additional validation requirements.~~
- ~~— Joint Planning Boards and National Parks. These were Government amendments to allow Joint planning Boards to be constituted which include the area of a national park authority.~~
- ~~— Enforcement and Appeals. The government supported amendments to regulate amendments and re-consultation once an appeal has commenced.~~
- ~~— Town and Village Greens. The Bill as introduced adopted the changes already in force in England which broadly restrict the right to apply for the registration of a town or village green to one year after access is terminated and once a site has entered the planning system. Notwithstanding the wide support for these reforms during the White paper consultation the Open Spaces Society successfully lobbied Government AM's to oppose the reforms with the result that the time limit for claiming a TVG remains at two years and protection from an application is only obtained once a site has the benefit of planning permission.~~
- ~~— Strategic Planning Panels. These were mainly opposition amendments relating to the constitution of the panels and their status. They also explored the issue of a gender equality provision, which the Government undertook to consider.~~

It is notable that, as outlined above, most of these amendments responded directly to issues raised, following evidence and scrutiny, in the Stage 1 Committee Report by the Environment and Sustainability Committee. However, as mentioned, the issue of third party appeals, although discussed and rejected in the IAG report and not a major consideration for the Committee at Stage 1 was now raised at this Stage and, as will be seen was raised and considered again at a later stage in the process.⁵¹

~~However, as mentioned, the issue of third party appeals, although discussed and rejected in the IAG report and not a major consideration for the Committee at Stage~~

⁵¹ *Towards a Welsh Planning Act: Ensuring the Planning System Delivers: Report to the Welsh Government by the Independent Advisory Group (IAG, 2012).* Available at <http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/towardsawelshplanningact/?lang=en>. See further discussion of Stage 3 below.

~~1 was now raised at this Stage and, as will be soon was raised and considered again at a later stage in the process.⁵²~~

Stage 3 – Detailed Consideration by the Assembly

Stage 3 began on the 17th March with the three hour Stage 3 debate held in Plenary Session on 6th May 2015. On this occasion some 80 amendments were tabled and these were grouped by the Presiding Officer with a lead amendment or amendments from each group selected for debate.⁵³ The debate at Stage 3 on the grouped amendments was largely taken by the Minister and the party leads on the Bill.

The grouping of the amendments reflects the issues that were raised in the Stage 3 debate: as do most of the issues of note:

- Statutory Purpose. The Government tabled amendments fulfilling its commitment at Stage 2 to introduce a statutory purpose for the planning system linked to the Well-being of future Generations Act 2015. In addition, the Government proposed a number of largely technical amendments related to the functions and duties of Joint Planning Boards, the powers to direct that applications to failing planning authorities should be made directly to the Welsh Ministers and nominations to the Strategic Planning Panels.
- Planning Inspectorate for Wales. The arguments for a separate Inspectorate were again rehearsed and rejected.
- National Development Framework. The Government supported a Liberal Democrat amendment requiring the NDF to explain how the Government has account of any Marine Plan and the Wales Transport Strategy.
- Strategic Planning. Amendments relating to the appointment of members by nominating bodies and gender balance.
- Community Involvement – statutory recognition of “place plans”.

~~Local Development Plans~~

- Joint Planning Boards and National Parks. A Government amendment made the Joint Planning Boards public bodies subject to the Well-being of Future Generations (Wales) Act 2015. The Government also accepted an amendment to restrict a Joint Planning Board with a National Park to the joint exercise of development control powers only. National Park LDP's will thus remain the responsibility of the Park Authorities.
- The Welsh Language. Significantly, the Government recognising a united stance by the opposition parties and its lack of a majority in the Assembly,

⁵² *Towards a Welsh Planning Act: Ensuring the Planning System Delivers: Report to the Welsh Government by the Independent Advisory Group (IAG, 2012)*. Available at <http://wales.gov.uk/topics/planning/planningresearch/publishedresearch/towardsawelshplanningact/?lang=en>. See further discussion of Stage 3 below.

⁵³ Marshalled amendments available at <http://www.senedd.assembly.wales/documents/s39614/Marshalled%20list%20of%20amendments%205%20May%202015.pdf>

altered its position and supported a Liberal Democrat amendment that it had opposed in the Stage 2 Committee to add a reference to the Welsh Language in section 70 of the TCPA 1990 to enable regard to be had to considerations relating to the use of Welsh “so far as material” to the application⁵⁴.

- ~~Health Impact Assessments.~~
- Developments of National Significance. The Government made amendments on the notification of local authorities and local impact reports by adjoining councils and community councils.⁵⁵
- ~~Local Development Plans.~~
- ~~Applications to Welsh Ministers.~~
- ~~Enforcement and appeals.~~
- ~~Strategic Planning Panels.~~

The Government therefore only succeeded in getting the Bill through Stage 3, having made some important concessions during both this stage and ~~the~~ Stage 2. ~~consideration. The most significant of these related to in particular on~~ the Welsh language, the statutory purpose of planning and town and village greens. However, there was a lively debate on a Plaid Cymru amendment to introduce a “community right of appeal”. This would have given any consultee or objector third party rights of appeal in limited circumstances, broadly where a planning decision was made contrary to the LDP. The Government resisted the amendments referring, in particular, to the greater emphasis on pre-application discussions that would result from the Bill’s provisions. In the event the government defeated the amendment but only by a single vote (21/20).

Report Stage

The Government has the option under the Assembly’s Standing Orders to move that there be an additional stage – the “Report Stage”, which gives an opportunity to further amend the Bill. The stage gives the Government an opportunity to reverse amendments made at Stage 3 or make further amendments. Had the community right of appeal been introduced at Stage 3, then it would have been possible for the Government either to seek to reverse the amendments or to further amend them,

⁵⁴ The wording of this amendment adopts the wording of section 70 (2)(b), applying only in England and which refers to “any local finance considerations, so far as material to the application”.

⁵⁵ Other issues included Health Impact Assessments; Local Development Plans; . Applications to Welsh Ministers; Enforcement and appeals; and Strategic Planning Panels.

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perhaps to cut back on the rights or to make the make the changes workable. In the event there was no need for a Report Stage for this Bill.

Stage 4

This was the final legislative stage consisting of a debate on a Government motion to approve the Bill. This was done in a short debate lasting barely quarter of an hour and consisting of short speeches by the Minister and the lead members of the other parties. In opening the debate, the Minister reiterated the Government's ambitions for the Act:

"The Bill will reform land use planning in Wales now and in the future to create a world-class planning system, delivering timely, fair and consistent decisions, which will enhance the built, natural and historic environments in Wales. It has involved public consultation and an extensive engagement with stakeholders, and I'm grateful for all those contributions. The Bill is based on a sound evidence base, which includes the thorough work of the independent advisory group, who I expressly thank today."⁵⁶

Royal Assent

Before a Welsh Bill can be presented for Royal Assent both the Attorney-General for the UK Government and the Counsel-General for Wales must consider whether to refer the Bill to the Supreme Court for the determination of any issues relating to the powers of the National Assembly to legislate⁵⁷. In the event no reference was made. Consequently, Letters Patent giving Royal Assent were signed by the Queen authorising the First Minister (as Keeper of the Welsh Seal) to affix the Welsh Seal. This was done on the 6th July 2015.⁵⁸

Consultations accompanying the Planning (Wales) Bill

In order to counter criticism arising as a result of the pre-legislative scrutiny by the Environment and Sustainability Committee and opposition AM's that the Bill was framework legislation and that the details to be included in secondary legislation was

⁵⁶ <http://www.senedd.assembly.wales/ieListDocuments.aspx?CId=153&MId=3165>

⁵⁷ This occurred on three occasions during the Fourth National Assembly Local Government Bye-laws (Wales) Bill Reference by the Attorney General for England Wales [2012] UKSC 53; Agriculture Sector (Wales) Bill Reference by the Attorney General for England and Wales [2014] UKSC 43; and Recovery of Medical Costs for Asbestos Disease (Wales) Bill [2015] UKSC 3.

⁵⁸ <http://www.assembly.wales/laid%20documents/pri-ld9940-ra/pri-ld9940-ra-e.pdf>

unclear, the Welsh Government published a suite of consultation documents at the same time as the Planning (Wales) Bill. These addressed the following topics:

- Local Development Plans Process Review.⁵⁹
- Frontloading the development management process.⁶⁰
- Design in the planning process.⁶¹
- Planning committees, delegations and joint planning boards.⁶²
- Review of planning application fees.⁶³
- Consultation on proposed amendments to legislation on the power to override easements and other rights.⁶⁴

These consultations closed ~~in non-16~~ January 2015. Further consultation documents have since been published relating to the Planning (Wales) Act 2015 on:

~~except the LDP Process review which closed on 2nd January.~~

~~Further consultation documents have since been published relating to the Planning (Wales) Act 2015 on:~~

- Secondary legislation for development management, covering: Invalid applications; Notices and appeals; Decision notices; Notification of development; Consultations in respect of certain applications for approval; Appeals against a notice issued in respect of unsightly land; Post-submission amendments, and Changes to applications made under section 73 of the Town and Country

⁵⁹ <http://wales.gov.uk/consultations/planning/local-development-plans-process-review/?lang=en>

⁶⁰ <http://wales.gov.uk/consultations/planning/frontloading-the-development-management-system/?lang=en>

⁶¹ <http://wales.gov.uk/consultations/planning/design-in-the-planning-process/?lang=en>

⁶² <http://wales.gov.uk/consultations/planning/planning-committees-delegation-and-joint-housing-boards/?lang=en>

⁶³ <http://wales.gov.uk/consultations/planning/review-of-planning-application-fees/?lang=en>

⁶⁴ <http://wales.gov.uk/consultations/planning/amendments-to-easements-and-other-rights/?lang=en>

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Planning Act 1990.⁶⁵ Consultation between 19 June 2015 and 11 September 2015

- Further secondary legislation for development management. covering; Statutory consultees; Design and access statements; and Houses in multiple occupation. Consultation between 3 August 2015 and 26 October 2015 ⁶⁶
- Proposals relating to Strategic Planning Panels Regulations: Composition and Financial Matters. Consultation between 10 August 2015 and 2 November 2015.⁶⁷

The Planning (Wales) Act 2015: Lessons in Law-Making for Wales Conclusions

The Planning (Wales) Act 2015 was one of the first pieces of primary legislation to be passed by the National Assembly for Wales and as such it provides an interesting case study of the evolution of the Welsh legislative process. The first important point is that the Assembly is only a small unicameral body which places limits on its ability to scrutinise legislation. The system therefore, relies heavily on its subject committees and the Stage 1 process of scrutiny. The Environment and Sustainability Committee took evidence from a wide range of witnesses, nearly all of whom were given the opportunity to provide oral as well as written evidence. The difference between the extent of scrutiny at the pre-legislative stage and Stage 1 of the Bill is however, striking. The former was a much more limited affair focusing on the concerns of a small group of planning focused institutions. Nevertheless, a number of important issues were raised during the scrutiny process which formed the basis of amendments at the later stages.

From our account of the scrutiny process and that of the evidence base for the initial draft of the Bill outlined in our previous paper, it would seem to fair conclude that the final Act was built upon wide ranging views and expertise. Nevertheless, the process also provides ample opportunity for political influence and the late addition of amendments on a 'community right of appeal' is a good illustration of this. Anecdotally, there also appears to have been significant differences in the way stakeholders sought to influence the legislative process. Professional and business organisations appear to have concentrated their efforts on the process of evidence gather and scrutiny, while non-government organisations conducted direct lobbying of AM's and Ministers. The success of the Open Spaces Society in securing the support of Labour AM's to water down the Bill's provisions in relation to Town and Village Greens is a notable example, as was that of the advocates for the Welsh

⁶⁵<http://gov.wales/consultations/planning/secondary-legislation-for-development-management/?status=closed&lang=en>

⁶⁶<http://gov.wales/consultations/planning/further-secondary-legislation-for-development-management/?status=closed&lang=en>

⁶⁷<http://gov.wales/consultations/planning/proposals-relating-to-strategic-planning-panels-regulations/?status=closed&lang=en>

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Language in obtaining explicit recognition of the impact of planning on the language as a material consideration.

It is also of note, that the concerns raised by the Constitutional and Legislative Affairs Committee about the Framework nature of the Act were never clearly addressed. Indeed, in its recent publication of the Implementation Plan for the new legislation, the Welsh Government specifically refer to this legislation as an Act that “sets out the general principles and framework of the new law”.⁶⁸ Planning has traditionally been an area of law that includes much secondary legislation, but the vast array of instruments issued for consultation since the passing of the Act is evidence that the Committee was right to be concerned about the level of detail that would be left to Welsh Ministers in the implementation of the legislation. It remains to be seen whether the right balance has been struck between primary legislation that will stand the test of time and secondary legislative powers that will give flexibility to adapt the system to change without conceding too much power to the executive.

Perhaps most significantly the passing of this Act and the others in this first legislative programme has been a learning experience for all involved – politicians and stakeholders alike. A wide range of stakeholders responded to all four pieces of legislation related to environmental protection and planning. This was a very ambitious programme of legislation and the efforts of those involved in providing a substantive response is to be firmly applauded. However, this was the first time that many of the individuals involved in these organisations had taken part in the legislative process and the speed and timing of consultation responses made this task particularly difficult. The fact that there is so much secondary legislation in relation to the Act has only served to exacerbate these problems.

⁶⁸ Positive Planning Implementation Plan (Welsh Government, 2015) available at <http://gov.wales/topics/planning/legislation/planning-wales-act-2015/positive-planning-implementation-plan/?lang=en>